**STATE OF CALIFORNIA**
**DEPARTMENT OF INSURANCE**
45 Fremont Street
San Francisco, CA 94105

**RH05049799** **January 5, 2007**

**Title 10, Article 7.1**
**Proposed Sections 2355.1-2359.7**
**Title Insurance and Statistical Plan**

**VOLUME 1 (Bates Pages 1-405)**

Summary and Response to Comments Received During 45-Day Comment Period

Pursuant to Gov. Code § 11346.9(a)(3), repetitive comments are aggregated, summarized and responded to as a group. Comments which were not specifically directed at the proposed regulations or procedures followed in proposing the regulations are irrelevant and have been dismissed as a group.

Additionally, because some comments reflect a more technical analysis of the proposed regulations, the summaries for those comments were not summarized as a group. Comments for pages 35-42, 75-82, 92-139, 154-179 and 230-257, which contain a more extensive technical analysis of the proposed regulations have been organized and summarized by comment volume number. The technical comments for Volume 1 are attached to the end of this summary and response.

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**Comment:**

**California Title Insurance and Escrow rates are cost effective, lower and competitive because of:**

- **Decreased escrow fees**
- **Decrease in refinance fees**
- **Competition that controls the price**
- **Customer service**
- **A bankrate.com study**

**Pages reflecting this comment:**

1, 2, 3, 9, 15, 18, 19, 22, 26, 27, 28, 187, 190, 192, 197a, 214, 227, 261, 264, 267, 269, 272a, 275, 276, 282, 284 291, 296, 305, 312, 324, 341, 346a, 348, 353, 356, 359, 360, 361, 365, 366, 371, 373, 375, 377, 380, 381, 382, 394, and 396.

**Response:**

See Response to Common Comments C.1, C.2, E.7, E.9, E.13, E.18, E.24, E.26, T.2, and X.18.

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**Comment:**

**Insurance title fees and real estate commissions are based on the price of the house.**

**Pages reflecting this comment:**

1, 2, 3

**Response:**

See Response to Common Comments E.13, T.4, T.11 and T.24,

To the extent that this comment refers to real estate commissions, those commissions are not within the regulatory authority of the Department of Insurance and are beyond the scope of this rulemaking project. Because this portion of the comment is beyond the scope of the proposed regulations, no further response is necessary.

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**Comment:**

**Title insurers have a right to make a profit.**

**Pages reflecting this comment:**

1, 2, 3, 8, 9, 14, 24, 26, 28, 220, 267, and 295.

**Response:**

See Response to Common Comments A.13 and X.18.

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**Comment:**

**The proposed regulations will result in fewer choices for customers closing escrow transactions and N/Ps.**

**Pages reflecting this comment:**

34, 192, 202, 210, 212, 258, 261, 298, 318, 328, 333, 335, 336, 357, 362, 367, 371, and 389.

**Response:**

See Response to Common Comments C.30, N.1, and T.1.

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**Comment:**

**The regulations are not needed because title insurance and escrow fees provide a valuable public service and the fees are not outrageous.**

**Pages reflecting this comment:**

1, 2, 3, 9, 12, 14, 16, 18, 23, 187, 190, 198, 267, 270, 272a, 276, 295, 296, 324, 353, 361, 362, 361, 371, 373, 377, 386, 388, and 394.

**Response:**

See Response to Common Comments T.5, and X.18.

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**Comment:**

**Title and escrow fees have reduced their fees and still make a profit due to good management and monitoring of cost.**

**Pages reflecting this comment:**

1, 2, 3.

**Response:**

See Response to Common Comments E.24, E.26, X. 7, X.11, and X.18.

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**Comment:**

**The Commissioner should postpone the hearings until he has a full understanding of the functions, cost, and regulation the industry already has and the liabilities of an escrow officer.**

**Pages reflecting this comment:**

4, 187, 190, 198, 207, 216, 217, 220, 225, 269, 282, 323, 325, 347, 353, 356, 363, 368, 371, 382, 384, and 393.

**Response:**

See Response to Common Comments X.20, and T.28.

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**Comment:**

**The current slow down in the industry and the proposed regulations' reduction of title and escrow fees will decrease pay and eliminate jobs for escrow providers and notaries public, and the remaining employees will be replaced with the under trained and inexperienced personnel who will be forced to endure a heavy workload resulting in fraud or errors or companies having settlement appointments.**

**Pages reflecting this comment:**

5, 6, 8, 9, 11, 12, 14, 18, 22, 24, 26, 28, 30, 32, 188, 190, 201, 207, 209, 210, 212, 216, 217, 218, 220, 221, 223, 225, 227, 257, 261, 262, 264, 265, 268, 270, 273, 276, 282, 283, 284, 289, 290, 291, 296, 297, 306, 314, 317, 318, 323, 328, 329, 341, 346b, 360, 361, 362, 363, 353, 365, 366, 367, 369, 371, 373, 375, 377, 381, 382, 384, 388, 389, 394, and 396.

**Response:**

See Response to Common Comments C.30, E.25, T.13 and X.9.

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**Comment:**

**The proposed regulation does not take into account the fluctuating price of Real Estate in California.**

**Pages reflecting this comment:**

360 and 365.

**Response:**

See Response to Common Comments C.31, E.25 and X.6.

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**Comment:**

**Escrow rates have not increased since 1996 and 2000.**

**Pages reflecting this comment:**

366 and 371.

**Response:**

See Response to Common Comments X.7.

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**Comment:**

**Reducing fees will result in a lower quality of service that is damaging to the public, causing delays and fraud to homebuyers and sellers and under values the contributions of the escrow officers and notaries public.**

**Pages reflecting this comment:**

5, 6, 8, 12, 13, 14, 17, 18, 22, 30, 47, 49, 51, 187, 188, 192, 202, 225, 227, 262, 264, 265, 267, 269, 272a, 275, 279, 282, 283, 289, 290, 291, 296, 301, 303, 305, 312, 314, 318, 323, 324, 329, 334, 343, 346b, 356, 357, 363, 365, 367, 371, and 373.

**Response:**

See Response to Common Comments C.1, C.3, C.30, E.15, E.22, N.1, X.8, X.12.

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**Comment:**

**The escrow business is stressful and no longer involves simple transactions to reach homeownership. Escrow, title and N/Ps employees now take on the duties, liabilities and responsibilities that others used to handle and this takes extra time and liability with little increase in compensation:**

- Document review
- Government attachments (child support, etc.)
- Copying
- Lender document
- Title document
- Disclosures
- Escrow instructions
- Exculpatory documents
- California withholding forms
- Franchise tax forms
- IRS liens
- Back child support

- Clear deeds and title
- Help state of California collect taxes and fees
- Coordinate paperwork
- Keep the peace between parties

**Pages reflecting this comment:**

7, 8, 16, 18, 19, 22, 27, 28, 30, 32, 34, 43, 45, 51, 187, 188, 192, 216, 217, 220, 225, 227, 263, 269, 270, 272a, 275, 276, 282, 283, 291, 295, 296, 297, 305, 312, 323, 324, 347, 348, 353, 356, 357, 359, 360, 361, 365, 369, 371, 373, 375, 381, 382, 388, 391, 393, and 396.

**Response:**

See Response to Common Comments E.12, and E.16.

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**Comment:**

**Technology has not increased the speed of escrow transactions or decreased complexity, and the costs to invest in infrastructure and expand in order to keep up with technology keep rising.**

**Pages reflecting this comment:**

7, 8, 16, 14, 18, 19, 22, 264, 339, 341, and 347.

**Response:**

See Response to Common Comments C.5 and X.10.

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**Comment:**

**Escrow officers work hard and put in long hours 6 days a week and overtime. These added costs have to be factored into every escrow transaction.**

**Pages reflecting this comment:**

7, 19, 22, 216, 217, 220, 267, 272, 273, 276, 283, 281, 289, 291, 301, 305, 312, 346a, 348, 356, 357, 363, 373, and 381.

**Response:**

See Response to Common Comments E.12, and E.13. Since employee costs are, in general, set by the proposed regulations at the industry-average costs, there is no basis for claiming that rates allowing recovery of those costs would be unreasonable.

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**Comment:**

**The business is owned or operated by, and will reduce job, opportunities, benefits and the salaries of:**

- Primary breadwinners
- Women
- Single moms
- Minorities
- The elderly
- The incapacitated
- Sole income
- Extra income
- Divorced

**Pages reflecting this comment:**

9, 12, 14, 17, 19, 22, 32, 188, 192, 216, 217, 218, 220, 221, 223, 225, 227, 258, 265, 267, 269, 279, 282, 289, 290, 291, 293, 295, 297, 309, 312, 313, 317, 323, 331, 338, 346b, 356, 369, 362, 363, 365, 368, 369, 371, 377, and 387.

**Response:**

See Response to Common Comments E.14, E.19, E.27, T.1, T.6, X.1.

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**Comment:**

**My company's expenses are due to the cost of paying for employees. My expenses are not due to marketing or reverse competition.**

**Pages reflecting this comment:**

357 and 394.

**Response:**

See Response to Common Comments T.1 and T.3. The regulations provide escrow companies with the opportunity to recover in charges the reasonable costs of providing

their service plus a reasonable profit. The implicit suggestion that firms may withdraw from the market, or be unable to reduce their expenses to reasonable levels is not a reason to allow excessive escrow charges.

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**Comment:**

**The proposed regulations will be a disincentive to work hard and to try to further one's career in the escrow business.**

**Pages reflecting this comment:**

394.

**Response:**

See Response to Common Comments E.27 and X.8.

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**Comment:**

**The proposed regulations were issued for political gain.**

**Pages reflecting this comment:**

9, 13, 38, 225, 301, 314, 317, 325, 326, 341, 346b, and 349.

**Response:**

See Response to Common Comments X.19.

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**Comment:**

**The focus should be on the fees, gouging and kickbacks given to the real estate agents, loan brokers and the mortgage brokers.**

**Pages reflecting this comment:**

9, 12, 197a, 264, 273, 276, 291, 368, and 396.

**Response:**

See Response to Common Comments X.17.

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**Comment:**

**Escrow Fees have been flat, are cost effective and are the lowest of all the expenses. The workers are underpaid for the amount of work done.**

**Pages reflecting this comment:**

18, 188, 197a, 225, 267, 282, 284, 291, 313, 317, 326, 341, 346b, 353, 359, 360, 368, 388, 393, 396, 365, 371, and 382.

**Response:**

See Response to Common Comments E.17, E.12, E.21 and E.26.

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**Comment:**

**Opposes the reduction of fees by 27% because it will be devastating to the industry and asks that the regulations be withdrawn.**

**Pages reflecting this comment:**

19, 28, 180, 187, 190, 192, 193, 206, 218, 221, 225, 227, 262, 263, 269, 278, 294, 297, 308, 310, 313, 347, 356, 369, 361, 366, 373, 377, 381, 388, 394, and 396.

**Response:**

See Response to Common Comments T.13, X.5, and X.11.

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**Comment:**

**The proposed regulations will impact small business.**

**Pages reflecting this comment:**

203, 258, 261, 269, 289, 290, 297, 317, 327, 333, 338, 334, 359, 366, 369, 375, 377, 389, and 384.

**Response:**

See Response to Common Comments T.7 and T.18.

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**Comment:**

**The commenter opposes fees on escrow companies.**

**Pages reflecting this comment:**

184.

**Response:**

See Response to Common Comments X.3.

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**Comment:**

**Propose regulations will decrease income by 60%.**

**Pages reflecting this comment:**

396.

**Response:**

See Response to Common Comments E.6 and X.11.

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**Comment:**

**Agrees with the regulations.**

**Pages reflecting this comment:**

23, 54, 228, 324, 351, and 352.

**Response:**

Because these comments are in support of the regulations, no further response is necessary.

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**Comment:**

**Regulations will increase fraud or lawsuits.**

**Pages reflecting this comment:**

187, 190, 269, 270, 272a, 276, and 284.

**Response:**

See Response to Common Comments C.3, C.32, N.1, and T.1.

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**Comment:**

**Opposes changes to Zip Code rating.**

**Pages reflecting this comment:**

25 and 190.

**Response:**

The proposed regulations do not concern zip code rating. Because this comment is not specifically directed at the Department's proposed action or to the procedures followed by the Department in proposing or adopting this regulation, no response is necessary.

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**Comment:**

**How can the DOI regulate escrow companies when it is not insurance?**

**Pages reflecting this comment:**

190 and 192.

**Response:**

The Department maintains regulatory jurisdiction over all charges, whether denominated premium or otherwise, when made to the public by a title insurer, an underwritten title company or a controlled escrow company for all services it performs in transacting the business of title insurance. To the extent that a controlled escrow company's charges fall within the definition of the "business of title insurance" as set forth in Insurance Code section 12340.3, those charges fall within the Department's regulatory control.

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**Comment:**

**The Competition Report that the Commissioner is relying on, authored by Birny Birnbaum is flawed.**

**Pages reflecting this comment:**

192, 269, 282, 323, 365, 368, 373, 375, 382, and 393.

**Response:**

See, generally, Responses to Common Comments C.1 through C.29.

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**Comment:**

**The Commissioner should focus on title fees.**

**Pages reflecting this comment:**

192.

**Response:**

Commissioner rejects this comment. As the Commissioner has observed, title fees represent just one component of excessive rates. In order to prevent excessive rates now and in the future and to ensure that excessive costs are not shifted to fees other than title fees, the Legislature authorized the Commissioner to regulate the entire charge.

The Department maintains regulatory jurisdiction over all charges, whether denominated premium or otherwise, when made to the public by a title insurer, an underwritten title company or a controlled escrow company for all services it performs in transacting the business of title insurance. To the extent that a controlled escrow company's charges fall within the definition of the "business of title insurance" as set forth in Insurance Code section 12340.3, those charges fall within the Department's regulatory control.

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**Comment:**

**The Commissioner should address in-house firms that do not provide competitive pricing or fees.**

**Pages reflecting this comment:**

197a.

**Response:**

The proposed regulations will address in-house firms, but also extend to other businesses because excessive rates have been observed throughout the California title market. There

is no reason why a title insurer, UTC, or controlled escrow company could not successfully operate under these proposed regulations, which are largely built on average industry costs. If companies do not have to match the extravagant sales expenses associated with reverse competition, it may well be that more, not fewer, companies will be able to compete on a more level field. Furthermore, to the extent some inefficient participants would withdraw from the market, that is no different from the outcome that would obtain in a competitive market.

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**Comment:**

**The propose regulation does not promote good business.**

**Pages reflecting this comment:**

361.

**Response:**

See Response to Common Comments T.5 and T.6.

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**Comment:**

- **The proposed regulations will make it impossible to get raises.**
- **The regulations will drastically reduce or slash escrow and title fees.**

**Pages reflecting this comment:**

209, 210, 324, 328, 365, and 369.

**Response:**

See Response to Common Comments T.5, T.6 and T.12.

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**Comment:**

**If the regulations go through, lawyers will be doing the same work as they do now in other states, at a greater cost to the consumer**.

**Pages reflecting this comment:**

227, 269, 272a, 353, 359, 360, 371, 375, and 393.

**Response:**

See Response to Common Comments E.15 and X.15.

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**Comment:**

**Escrow Companies will be forced to stop using notaries and will have to conduct more settlement appointments, which in turn will make the process less efficient.**

**Pages reflecting this comment:**

258, 318, and 328.

**Response:**

See Response to Common Comments N.1.

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**Comment:**

**Look into medical fraud, unlicensed drivers, the high cost of insurance for homeowners, private passenger auto, and insurer's cancellations after a claim is made.**

**Pages reflecting this comment:**

262 and 383.

**Response:**

Because this comment is not specifically directed at the Department's proposed action or to the procedures followed by the Department in proposing or adopting this regulation, no response is necessary.

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**Comment:**

**The regulations should focus on over priced title fees, endorsements and mortgage broker fees.**

**Pages reflecting this comment:**

207, 270, 291, 313, and 363.

**Response:**

The proposed regulations will focus on over-priced title fees and endorsements by establishing a maximum rate for all entities that conduct the business of title insurance, as defined in Insurance Code section 12340.3. Mortgage broker fees, however, are not within the Commissioner's jurisdiction and are not subject to these regulations.

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**Comment:**

**Escrow agents fee have remained the same, however they do the most important work and get paid the least.**

**Pages reflecting this comment:**

272a, 313, 317, 323, 349, 361, and 371.

**Response:**

See Response to Common Comments E.9, E.12, and E.13.

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**Comment:**

**Regulations will hurt the whole economy/general public.**

**Pages reflecting this comment:**

272a, 290, 306, 318, 319, 324, 331, 350, and 313.

**Response:**

See Response to Common Comments C.3, T.1, and X.14.

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**Comment:**

**Notary public clients and escrow agents are offended that it is implied that they secure business through kickbacks or gifts rather than customer service.**

**Pages reflecting this comment:**

291, 313, 346a, 348, 356, 357, 359, 360, 361, 368, 371, 373, and 393.

**Response:**

See Response to Common Comments N.1, C.1, C.2 and C.3.

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**Comment:**

**Should be allowed to charge whatever the market will bear.**

**Pages reflecting this comment:**

295.

**Response:**

See Response to Common Comments C.33 and C.30.

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**Comment:**

**The proposed regulations will affect non-profit housing and the non-profit community by preventing title and escrow from providing discounts to non-profit groups.**

**Pages reflecting this comment:**

221 and 223.

**Response:**

See Responses to Common Comments E.25 and T.23. The regulations determine allowable costs and charges on the basis of industry-representative data. The discounts/relativities appearing in the regulations were derived from a comparison of relativities filed by companies. Furthermore, relativities are expected to be on-balance – that their collective effect should be neutral on revenues. So to the extent that a company uses a higher relativity for, say, a specific endorsement, it will be using a lower relativity for some other endorsement. The differences should have little or no effect on total revenues.

It should be remembered, no company is required to employ the regulatory relativities, nor is any company prohibited from employing different relativities. The relativities are merely inputs to the calculation of the regulatory maxima.

The regulations will not prevent title insurers or escrow entities from providing discounts to non-profit groups. The purpose of the regulations is simply to prohibit excessive rates.

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**Comment:**

**The proposed regulations will adversely affect homeowners.**

**Pages reflecting this comment:**

221, 223, 344, 365, and 379.

**Response:**

See Response to Common Comments C.32. T.1 and X.14.

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**Comment:**

**Economically, the regulations will destroy communities.**

**Pages reflecting this comment:**

221 and 223.

**Response:**

See Response to Common Comments C.30, C.32, T.1, T.13, X.9, and X.14.

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**Comment:**

**Change the industry by requiring more education.**

**Pages reflecting this comment:**

272a.

**Response:**

See Response to Common Comments X.16.

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**Comment:**

**Escrow fees are flat and not based on a commission. The proposed regulations single out escrow.**

**Pages reflecting this comment:**

295 and 365.

**Response:**

See Response to Common Comments E. 17. The proposed regulations do not single out the escrow industry, but instead focus on the entire rate. The regulations are designed to regulate all of the charges that affect the excessive nature of rates in the current market. These charges are made by title insurers, underwritten title companies and controlled escrow companies.

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**Comment:**

**The proposed regulation projects the problems of a few excessive charges and signing services on to the whole industry.**

**Pages reflecting this comment:**

347.

**Response:**

The Commissioner rejects this comment. Commenter has offered no evidence that particular companies will be relatively disadvantaged by the proposed regulations. It is not the purpose or effect of the regulations to give to, or take away from, companies any advantage they might have in a competitive market.

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**Comment:**

**The proposed regulations will directly affect independent escrow offices.**

**Pages reflecting this comment:**

362.

**Response:**

See Response to Common Comments E.1.

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**Comment:**

**Current marketing of services does not lead to higher prices.**

**Pages reflecting this comment:**

346a.

**Response:**

See Response to Common Comments C.11 through C.14.

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**Comment:**

**The proposed regulations will cause a reduction in the work staff and consequently will increase the mishandling of public funds because broker-owned mortgage companies have the worst mismanagement of public funds and independent escrows will no longer have sufficient staff to avoid such mismanagement.**

**Pages reflecting this comment:**

339.

**Response:**

See Response to Common Comments C.3, C.30, E.22, and E.29.

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**Comment:**

**The commenter agrees with the regulation that the product should be marketed to the general consumer.**

**Pages reflecting this comment:**

346a.

**Response:**

Because these comments are in support of the regulations, no further response is necessary.

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**Comment:**

**Why do broker owned escrow companies escape investigation under the proposed regulations?**

**Pages reflecting this comment:**

324.

**Response:**

The Insurance Code clearly contemplates the regulation of controlled escrow companies, implicitly recognizing and accepting any incidental effects on independent escrow companies and their regulation by the Department of Corporations.
The Commissioner does not claim the authority to regulate the rates of independent escrow companies, and the proposed regulations do not purport to exercise any such regulatory authority. To the extent that any broker-owned escrow companies fall within the definition of a controlled escrow company, the companies will be subject to these regulations.

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**Comment:**

**Insurance Code sections 12401.3 and 12401.5 have improved the industry. The proposed regulations are a step back.**

**Pages reflecting this comment:**

346a.

**Response:**

The Commissioner rejects this comment and disagrees with the suggestion that allowing rates to be charged without any regulatory oversight of excessive rates is an "improvement." The proposed regulations are dictated by Insurance Code section 12401.3, which says the Commissioner must make a finding of no-reasonable-degree-of-competition before he may find a rate excessive.

The fact that there is not a reasonable degree of price-competition means that the competitive market cannot be relied upon to provide reasonable prices, triggering the need for rate-regulation. Moreover, Insurance Code section 12401.5 authorizes the Commissioner to collect financial data through a statistical plan. The proposed regulations, consequently, will implement Insurance Code sections 12401.3 and 12401.5.

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**Comment:**

**Fees do not vary much in the escrow industry due to regulation by the Department of Insurance.**

**Pages reflecting this comment:**

348.

**Response:**

See Response to Common Comments E.11.

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**Comment:**

**Escrow is the glue that binds the transaction together.**

**Pages reflecting this comment:**

313.

**Response:**

This comment is not directed at the regulations or to the procedures followed by the Department in proposing or adopting the regulations. No further response is, therefore, necessary.

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**Comment:**

**The proposed regulations should be focused on financial institutions.**

**Pages reflecting this comment:**

316.

**Response:**

The Department of Insurance does not have regulatory authority over the actions of financial institutions. Because excessive rates exist within the title insurance, underwritten title company, and controlled escrow business, the Department has concluded that these regulations are necessary to prohibit excessive rates for these licensees that are within the Department's regulatory authority.

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**Comment:**

Stop taking away my livelihood.

**Pages reflecting this comment:**

342.

**Response:**

See Response to Common Comments T.13.

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**Comment:**

**The rollback will allow title companies to further unfairly compete because of the side business that small businesses do not have the ability to run.**

**Pages reflecting this comment:**

362.

**Response:**

See Response to Common Comments T.18 and X.1.

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**Comment:**

**Fees should be increased.**

**Pages reflecting this comment:**

368.

**Response:**

The Commissioner rejects this comment and has concluded that the substantial majority of title licensees should reduce their fees, rather than increase them.

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**Comment:**

**The proposed regulations are attempting to circumvent the law by issuing flawed regulations based on a discredited report.**

**Pages reflecting this comment:**

375.

**Response:**

The Commissioner rejects this comment for the reasons set forth in response to those comments addressing the Competition Report and for the reasons set forth in the Commissioner's Final Statement of Reasons.

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**Comment:**

**Virtual escrow companies are overcharging customers.**

**Pages reflecting this comment:**

380.

**Response:**

Because this comment is generally in support of the regulations, is not specifically directed at the Department's proposed action or to the procedures followed by the Department in proposing or adopting this regulation, no response is necessary.

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**Comment:**

**The Commissioner should reduce loan fees.**

**Pages reflecting this comment:**

73 and 74.

**Response:**

The Department of Insurance does not have regulatory authority over the actions of financial institutions. Because excessive rates exist within the title insurance, underwritten title company, and controlled escrow business, the Department has concluded that these regulations are necessary to prohibit excessive rates for these licensees that are within the Department's regulatory authority.

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**Comment:**

**NOTARY PUBLICS**

**The proposed regulations will:**

- **Drive up fees for NP**
- **Put notaries out of work**

- **Result in an increase in falsified real property transactions**
- **Compel title insurance and escrow officers to stop using notaries, or limit the use of mobile notaries**
- **Reduce notaries income and increase economic hardship for notaries**
- **Deter people from pursuing a profession as a notary**
- **Increase the demand for notaries**

**Pages reflecting this comment:**

5, 6, 11, 24, 25, 26, 27, 28, 30, 32, 34, 43, 45, 47, 48, 49, 51, 52, 53, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 98, 180, 181, 184, 185, 186, 189, 193, 194, 195, 196, 199, 203, 205, 206, 207, 209, 210, 211, 212, 213, 214, 219, 229, 258, 262, 263, 265, 273, 274, 279, 281, 282, 283, 285, 286, 289, 293, 294, 298, 300, 301, 302, 303, 305, 306, 307, 308, 309, 310, 311, 312, 316, 317, 318, 319, 320, 321, 322, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 338, 339, 340, 341, 343, 344, 345, 346b, 347, 350, 353, 355, 357, 378, 360, 361, 367, 373, 374, 375, 377, 379, 384, 385, 387, 389, 391, 389, 392, 393, and 396.

**Response:**

See Response to Common Comment N.1.

TITLE 10. INVESTMENTS
CHAPTER 5. INSURANCE COMMISSIONER
***Article 7.1***
***TITLE INSURANCE STATISTICAL PLAN***
***AND RELATED RULES GOVERNING RATES AND CHARGES***

Summary and Response to Technical Comments Received During
45-day Comment Period

**Volume 1, Comment Bates Pages 35-42:**

**Commentator:** United Policyholders
**Date of Comment:** Received 8/30/06
**Type of Comment:** Written

With the possible exception of those portions of the comment that are summarized below, this comment was entirely in support of the regulations. No response is, therefore, necessary.

**Summary of Comment (Bates Page 37):**

Although the Commissioner's rulemaking notice states that he has not identified any reasonable alternatives to the proposed regulations, there is another alternative. The state of Iowa issues title insurance through a state-owned facility. This state-owned product has dropped prices significantly and has eliminated the presence of other title insurers in the state.

**Response to Comment:**

The Commissioner rejects this comment. This alternative is beyond the authority granted to the Commissioner by the Legislature.

**Summary of Comment (Bates Page 37):**

The proposed regulations should help create a truly competitive market for title insurance. This market should be an environment in which the sellers are directly courting the buyers of their product. The proposed regulations do not address the excessive rewards and other rebates that are paid to realtors and lenders in order to lock in referrals.

**Response to Comment:**

The Commissioner agrees that sellers should directly market their product to the home buyer. By prohibiting excessive rates and requiring title insurers, underwritten title

companies and controlled escrow companies to report their true operating costs, the proposed regulations will prohibit costs that are not reasonably justified. Thus, the proposed regulations will remove many incentives to rebate or market to third-party intermediaries. The Commissioner will also continue to vigorously enforce the laws prohibiting rebating and kickbacks in order to provide further disincentives for such illegal practices.

**Summary of Comment (Bates Page 38):**

The proposed regulations should include a disclosure requirement to consumers which will notify consumers of all of the bonuses and rewards that are given to third-party intermediaries. Similarly, the regulations should require the disclosure of the controlled business relationships between the entities to the real estate transaction so that the homebuyer can make an informed decision.

**Response to Comment:**

The Commissioner has considered this alternative, but does not have any immediate plans to implement such a proposal. This is due, in part, to the fact that the average homebuyer is inundated with disclosures during the typical real estate transaction. It is not clear that a new disclosure of controlled business relationships or other notification could reasonably be considered by a home buyer or seller under the typically time-sensitive environment within which most real estate transactions occur.

**Summary of Comment (Bates Page 38):**

The proposed regulations should include a disclosure requirement which educates the consumer about how title insurance works, explains the coverage provided and what additional coverage is available for purchase.

**Response to Comment:**

While each of these disclosures is laudable and strongly encouraged, the goal of the proposed regulations is to control excessive rates. The Commissioner believes that the proposed regulations are the most effective means to meet that goal.

**Summary of Comment (Bates Page 38):**

The proposed regulations should address the fact that property buyers are forced to pay for insurance that inures to the benefit of the banks and lenders. Lenders should be required to pay for the cost of title insurance. Alternatively, sellers should be required to pay for a portion of the cost for the policy.

**Response to Comment:**

The Commissioner's statutory authority does not include the power to require banks and financial institutions to pay for title insurance. Similarly, the Commissioner lacks the power to require sellers to pay for some, or all, of the title insurance product.

**Volume 1, Comment Bates Pages 75-91:**

**Commentator:** California Attorney General Bill Lockyer by Albert Norman Shelden, Ronald Reiter and Christina Tusan.
**Date of Comment:** Dated and received August 30, 2006
**Type of Comment:** Written

With the possible exception of those portions of the comment that are summarized below, this comment was entirely in support of the regulations. No response is, therefore, necessary.

**Summary of Comment (page 1):**

Page 1 is a title page.

**Response to Comment:**

This portion of the comment is not specifically directed at the Commissioner's proposed regulations or to the procedures followed in proposing the regulations, or simply summarizes comments which are summarized and responded to in more detail below. No response is, therefore, necessary. (Gov. Code section 11346.9.)

**Summary of Comment (page 1):**

The Attorney General supports the Department's goal of eradicating excessive title and escrow rates and ensuring uniform administration of rate regulatory laws, but recommends limited modifications.

The first proposed modification is the addition of a required disclosure category for "financial benefits." The value of benefits received, in whatever form, should be considered as part of title insurance companies' income for purposes of evaluating whether rates are excessive. Further, the disclosure requirement in proposed section 2358.8 should be modified to clarify the following: 1) the disclosure does not constitute a waiver of any rights a consumer may have, including rights under Insurance Code section 12314.5; 2) the disclosure must be in at least 10-point font and in a typeface equivalent to Times New Roman; 3) any fee charged for setting up an interest-bearing account must be reasonably related to the title company's cost for opening and maintaining that account; and 5) any set-up fee and transaction-specific estimate of interest likely to be earned must be disclosed no later than five days after the escrow is opened.

**Response to Comment:**

This portion of the comment simply summarizes comments which are summarized and responded to in more detail below. No response is, therefore, necessary. (Gov. Code section 11346.9.)

**Summary of Comment (pages 2-3):**

The proposed regulations must be reviewed to ensure they are consistent with Insurance Code section 12413.5 which prohibits title companies from using escrow funds for purposes other than fulfilling the terms of individual escrows and using funds until escrow conditions are met. (See Gov. Code section 11342.2 (to be valid or effective, a regulation must be consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute); Gov. Code section 11349.1(a)(4); *Association for Retarded Citizens v. Dep't of Developmental Svs.* (1985) 38 Cal.3d 384, 391.) "Consistency" means "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." (Gov. Code section 11349(d).) Administrative regulations that "alter or amend the statute . . . or impair its scope" must be struck down. (See *Gregory v. State Bd. of Control* (1999) 73 Cal.App.4th 584, 594.) The Attorney General's recommended modifications will ensure consistency with Insurance Code section 12413.5.

To be consistent with Insurance Code section 12413.5, title companies must disclose specific details regarding the amount and types of all financial benefits they receive as a result of depositing funds for escrows they conduct. The value of benefits received, in whatever form, should be considered as income for the purposes of evaluating whether rates charged by the companies are excessive. The addition of a required disclosure category for "financial benefits" is consistent with the requirements of Insurance Code section 12413.5 and is critical to evaluate whether the title insurance companies are charging rates consistent with Insurance Code section 12401.3.

**Response to Comment:**

The Commissioner agrees with the substantive position of the commenter. However, he has decided not to include a disclosure provision in the proposed regulations because such a provision lies outside the purpose of promulgating a statistical plan and assisting in the identification and disapproval of excessive rates. This decision is without prejudice to future actions to ensure required disclosures are made.

**Summary of Comment (page 3):**

Under Insurance Code section 12413.5, title company controlled escrows are expressly permitted to aggregate the funds received in connection with various escrows in a common bank account. The escrow company has to account for each escrow separately on its books, and the statute establishes that escrow funds are owned by the person/entity that deposited the funds. The funds may be used only to fulfill the terms of the escrow

and cannot be used until the terms of each individual escrow has been satisfied. The statute further requires that "any interest" received by the escrow on escrow funds must be "paid over by the escrow to the depositing party."

Title companies routinely aggregate escrow funds from various escrows in a common account. Financial institutions with which title companies deposit escrow funds provide an array of financial benefits to entice title companies to deposit their very large aggregated escrow funds with them. Banking law, including "Regulation Q," prohibits financial institutions from paying interest, but banking regulators have interpreted "interest" to permit the payment of various forms of financial benefits, such as free banking services, payment of certain banking-related expenses, and below-market interest rate loans. The amount of financial benefits received by title company-controlled escrows is equal to tens of millions annually. Title companies, however, do not directly account to each escrow depositor the value of financial benefits attributable to the funds placed in escrow.

Title companies' use of escrow funds held in a fiduciary capacity to garner financial benefits is a problematic practice. Insurance Code section 12413.5 provides that interest earned on escrow funds does not belong to the title companies and the escrow funds "shall be used only to fulfill the terms of the individual escrow." Yet the title companies use those funds while escrows are pending.

The court in *State of California, et al. v. Old Republic Title Company*¸ San Francisco Superior Court, Case No. 993507 held that "interest" as that term is used in Insurance Code section 12413.5 refers to money paid for the use, forbearance or retention of money; accordingly, financial benefits constituted "interest" within the meaning of Regulation Q and similar banking regulations. The Attorney General and district and city attorneys of San Francisco filed civil actions against title companies for failing to pay over the value of financial benefits to customers as required in Insurance Code Section 12413.5 (case names are provided in the comment). Settlements of these actions included civil penalties, restitution and injunctive relief relating to financial benefits. Under the stipulated judgments, the full value of all financial benefits must be exclusively used to underwrite the cost of escrow services and fully allocated to the title company's escrow operations. The title company is also required to maintain, with a retention period of a minimum of three fiscal years, accounting information that demonstrates compliance with this provision. In addition, the settling companies are prohibited from charging customers for items they receive at no charge. The Attorney General is concerned that the provisions of the proposed regulations may undermine these injunctive provisions by creating a formula for calculating excessive rates that does not adequately account for the companies' collection of financial benefits.

**Response to Comment:**

The Commissioner agrees that companies should be prohibited from retaining any interest, broadly defined, that the title company receives for holding escrow funds. However, as these proposed regulations operate, any benefit to the title company,

including the receipt of free services, would be reflected in either received revenue or diminished expenses, either of which would inure to the benefit of consumers by appropriately lower maximum rates. There are substantial questions of inter-consumer equity, to which the commenter alludes, but those questions lie outside the scope of these proposed regulations.

**Summary of Comment (pages 5-7):**

The proposed disclosure requirements concerning interest-bearing accounts should be modified. Proposed section 2358.8 includes a problematic requirement that companies offer consumers the option of paying $25 to have an interest-bearing account opened during the escrow process. The Attorney General believes this section is insufficient because: 1) it may be improperly used by title companies to justify retention of financial benefits received on escrow deposits when escrow customers choose to pay for a special interest-bearing account; 2) it does not require that title companies provide customers with sufficient information necessary to make an informed decision about opening an interest-bearing account; 3) it lacks typeface and font requirements necessary for a meaningful disclosure; and 4) it omits any requirement concerning the point in the transaction when such disclosures must be made. Moreover,

1) Title insurers may argue that completion of a transaction following receipt of the disclosure language in proposed section 2358.7 constitutes a waiver of the consumers' right to retain the financial benefits earned on their deposit. The Attorney General's recommend modification of this section to make it clear that any interest or benefit earned on escrow accounts belong to the escrow depositors, not to the title company. This section should be modified to state that such notices do not constitute a waiver of any consumers' rights, including rights under Insurance Code section 12413.5, and that any financial benefits collected by the title company belong to the consumer.

2) The proposed regulations should be modified to require that if any charge for setting up an interest-bearing account is made (other than a de minimis charge) title companies must provide a transaction-specific estimate of the amount of interest the consumer can expect to receive and the specific fee for the account. Without such a disclosure, consumers will be unable to evaluate whether it is beneficial to set up an interest-bearing account.

3) Timing of the disclosure is critical. If a consumer is not told about the option to open an interest-bearing account at the outset of the transaction, the consumer faces diminishing benefits as the time during which interest could accrue decreases. The proposed regulations omit a time frame requirement for the proposed disclosure. The Attorney General recommends modification to the regulation to require title companies to make the required disclosure no later than 5 days after escrow is opened.

4) The Attorney General recommends the proposed regulations require the disclosure in at least 10 point font and a typeface no smaller than Times New Roman. The disclosure should be on a separate piece of paper and should include a separate signature line for customers interested in authorizing the opening of such an account.

5) Title companies should be prohibited from charging fees that are not reasonably related to the costs they actually incur in setting up and maintaining the interest-bearing account. The Attorney General does not object to setting an upper limit of $25 for fees charged for interest-bearing accounts; however it may cost title companies substantially less than $25. To the extent that is the case, the title company (a fiduciary) should not be allowed to make a profit on the customers' desire to set up an interest-bearing account.

The Commissioner has eliminated the portion of section 2358.8 to which the commenter objects regarding the $25 fee. That avoids any "waiver" argument about which the commenter is concerned. Language has been added to further dispel any such argument. All disclosure provisions have been eliminated because the Commissioner has determined that such requirements, while salutary, lie outside the purpose of the proposed regulations.

**Summary of Comment (Bates pages 83-91) :**

Bates pages 83-91 contain a duplicate copy of the Attorney General's comments.

**Response to Comment:**

No response to this duplicate is required.

**Volume 1, Comment No. 92-139:**

**Commentator:** Ronald J. Blitenthal on behalf of the American Guaranty Title Insurance Company
**Date of Comment:** Received 8/24/06
**Type of Comment:** Written

**Summary of Comment (page 1):**

This passage summarizes the commenter's affiliation as well as a brief description of the affiliate's status as a licensee of the Department.

**Response to Comment:**

This portion of the comment is not specifically directed at the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.)

**Summary of Comment (page 1):**

In addition to concluding that there is not a reasonable degree of competition, Insurance Code section 12401.3 requires the Commissioner to make a finding that rates are unreasonably high. This finding is required to be made on an individual basis rather than for the industry as a whole, because Insurance Code section 12401.3(c) provides that "systems of expense provisions included in the rates for use by any title insurer, underwritten title company, or controlled escrow company may differ from those of other title insurers, underwritten title companies or controlled business companies." Thus, the proposed regulations inappropriately seek to make a finding of excessiveness on an industry-wide basis.

**Response to Comment:**

The Commissioner rejects this comment. He disagrees that Insurance Code section 12401.3, subdivision (c), has the effect the commenter attributes to it. On its face, the statutory provision addresses the system of expense provisions – not the maximum quantum of expenses to be reflected in rates, and not the maximum permitted rate. The passage refers to the classification of expenses into categories that may be used by the company, not to the authorized rate level.

**Summary of Comment (page 1):**

The Department seems to have ignored studies that convincingly argue that rates are not unreasonably high under the present regulatory system. Contrary to the findings in the Competition Report, the Stangle and Strombom study entitled "Competition and Title Insurance Rates in California," attached as Exhibit A to these comments, shows that title insurance rates have actually dropped during the last several decades while coverage has expanded over the same period of time.

**Response to Comment:**

The Commissioner rejects this comment. He was not persuaded by the Stangle and Strombom study for reasons detailed in his separate responses to that study.

**Summary of Comment (page 1):**

The Competition Report does not even consider the impact of expanded coverages, nor does it mention the special discount rates that have proliferated in recent years.

**Response to Comment:**

The Commissioner rejects this comment. The impact of expanded coverages is reflected in the incurred losses, which are fully recognized in the rate calculations. The commenter has failed to proffer any evidence that the proliferation of special discounts affects a

significant number of transactions and that discount rates are widely available in the industry.

**Summary of Comment (page 2):**

Dr. Nelson Lipshutz' preliminary study, entitled "Incorrect Conclusions about Competition" and attached as Exhibit B to these comments, finds that the 12-18% profitability rate for title insurers in 2004 pales in comparison to the return on equity observed for companies in the Dow Jones and S & P 500 for that same year. These findings demonstrate that California title insurance rates are not unreasonably high.

**Response to Comment:**

The Commissioner rejects this comment. The Commissioner has responded to Dr. Lipshutz's comments separately in this file.

**Summary of Comment (page 2):**

By limiting the analysis strictly to price competition, the Competition Report fails to truly consider whether real competition exists. Other elements of competition that are not considered by the Competition Report, such as competition based on product quality or service, are integral components of whether a rate is excessive or not. Companies that spend more time and money to search and examine title in order to protect its insureds need more funds to do so. Similarly, if a company has better service, it needs more or better staff to provide that service, which comes at a price.

**Response to Comment:**

The Commissioner rejects this comment. The inquiry into competition is dictated by Insurance Code section 12401.3, which says the Commissioner must make a finding of no-reasonable-degree-of-competition before he may find a rate excessive. The fact that the finding is a precondition to rate regulation strongly indicates the Legislature's intent that the finding be pertinent to the existence or absence of price-competition. The fact that there is not a reasonable degree of price-competition means that the competitive market cannot be relied upon to provide reasonable prices, triggering the need for rate-regulation. Accordingly, the Competition Report's focus on price-competition is entirely appropriate. The Commissioner also rejects the comment about service. The commenter has provided no evidence to support the claim that service will suffer and no evidence to support the claim that any reduction in service is significant or sufficient to justify higher prices.

There has been no showing that the sums expended for sales provide any benefit to the consumer.

**Summary of Comment (page 2):**

To the extent that the Competition Report does look at price competition, its conclusion that rate competition does not exist is incorrect. For example, page 22 of the Competition Report shows a huge range of prices among the escrow companies examined. Similarly, Dr. Lipshutz' analysis shows that the actual range of rates for owners' policies ranges from 16% above average to 8% below average. The range of lenders policy rates is even more dramatic. These facts show that there is a broad range of rates for consumers to choose from.

**Response to Comment:**

The Commissioner rejects this comment. What the Competition Report and the comments of industry witnesses both show is that there is very little pricing diversity among the large companies. While some smaller firms' rates vary, there is no evidence that these firms' market shares are sufficient to affect the overall market. On the contrary, the fact that the larger firms have not found it necessary to meet the lower prices of the smaller firms confirms the absence of price-competition.

**Summary of Comment (page 2):**

The Competition Report's discussion of reverse competition is theoretical rather than factual. The Competition Report does not compare the actual costs of marketing title insurance to realtors and lenders to the costs of direct marketing to consumers that lack a similar understanding of the insurance product. The Competition Report also does not take into account the large number of companies that do not give kickbacks. It is demonstrably incorrect for the Competition Report to suggest that every company is engaging in kickbacks in order to obtain a significant amount of their business.

**Response to Comment:**

The Commissioner rejects this comment. The asserted absence of a cost-comparison between direct marketing and marketing to middle-men bears no reasonable relationship to assessment of the market's competitive conditions, and neither the Competition Report nor the proposed regulations relies on direct marketing. Indeed, to the extent direct marketing is infeasible, as the comment suggests, it supports the observation of reverse competition – the competition for business not on the basis of price-competition but on the basis of referrals. As to the existence of companies that do not engage in kickbacks, the commenter offers no evidence of their existence or prevalence and, in any event, does not refute the fact that price-competition is not the basis for competition in this market.

**Summary of Comment (page 2-3):**

The Competition Report's discussion of barriers to entry fails to mention the large number of new underwritten title companies and escrow companies that have entered the market, as described in Dr. Lipshutz' comments at pages 7-8 of Exhibit B. These facts belie the implications of the Competition Report which would suggest that it is difficult to enter the market and that competition does not exist. By stating that the lack of

established business relationships are a barrier to entry, the Competition Report fails to consider the fact that every new company must market itself or hire other personnel with established relationships in order to find customers. This phenomenon is common for title insurance, escrow and any other product or service.

**Response to Comment:**

The Commissioner rejects this comment, the substance of which he responds to in his responses to the comments of Dr. Lipshutz.

**Summary of Comment (page 3):**

Insurance Code section 12401 provides that the purpose of "this article [is] to permit and encourage competition between persons or entities engaged in the business of title insurance on a sound financial basis…" Yet, the proposed regulations do not attempt to determine whether the interim rate is inadequate, or whether the rate will allow the title insurance industry to operate on a "sound financial basis." Moreover, by setting a maximum rate, the proposed regulations discourage price competition and threaten to remove the level of variance in rates that is observed in the market today.

**Response to Comment:**

The Commissioner rejects this comment. The interim rates are based on each company's own costs in 2000, adjusted for increased costs since 2000. If the rate was not inadequate in 2000, there is no reason why it should be inadequate during the period of interim rates. The Commissioner also rejects the suggestion that Insurance Code section 12401 is intended to encourage competition by permitting the charging of excessive rates. The competition being encouraged by the Insurance Code is competition within the range of reasonable rates that are neither excessive nor inadequate, and companies remain free to compete within that range.

**Summary of Comment (page 3):**

By setting a maximum rate for title insurance and escrow fees, the proposed regulations directly violate Insurance Code section 12401, which expressly states that the commissioner has no such power to "fix and determine a rate level by classification or otherwise."

**Response to Comment:**

The Commissioner rejects this comment. The proposed regulations do not "fix" or "determine" rate levels. They define the level above which the rate is excessive. Companies are free to compete by charging any rate they wish so long as the rate is not "excessive." Insurance Code section 12401.3. It has long been understood that the code authorizes the Commissioner to prohibit excessive rates and that doing so does not constitute the proscribed fixing or determination of rates.

**Summary of Comment (page 3):**

The data that the proposed regulations seek to collect through a statistical plan may not be used for the purposes proposed by the Commissioner. Insurance Code section 12401.5(d) states that "no statistical plan or modifications thereto, or rules or regulations pertaining thereto, shall do any of the following: … (2) Conflict with the purpose and express intent of Section 12401. (3) Fix, determine, or in any way impair competitive rating or the free market." Because the proposed regulations seek to analyze industry profitability and to adjust the maximum cost of title insurance in the future, they directly conflict with this statute.

**Response to Comment:**

The Commissioner rejects this comment. The proposed regulations do not "fix" or "determine" rates. Those words describe regulatory regimes where the regulator specifies the rate that must be charged, as is done is several states. The proposed regulations specify a maximum and permit companies to charge any rate that does not exceed the maximum. That preserves both "competitive rating" and, to the extent it otherwise exists, a "free market." The regulations merely limit competition within the range of rates that are not excessive.

**Summary of Comment (page 3):**

Because the legislature uses the modifier "financial" with the categories of information that the Commissioner may collect through a statistical plan, this evinces a strong legislative intent that the Legislature only intended for the Commissioner to collect information which relates to the financial performance of the entities subject to the Commissioner's regulatory control. The Legislature does not appear to have intended to grant the Commissioner authority to engage in the far-ranging inquiries that the proposed regulations seek to delve into. By way of example, information regarding the specific role fulfilled by a title company for each party to a transaction, the source of the business transaction or detailed information about personnel, seems to be outside of the realm of information the Legislature authorized the Commissioner to collect through a statistical plan.

**Response to Comment:**

The Commissioner rejects this comment. The word "financial," as used in the statute, embraces all of the data that affects the company's financial condition and results, including all of its costs. Taking the commenter's example of personnel costs, there can be no doubt that a company's personnel costs is included in its "financial data"; the Commissioner assumes that the commenter would not claim that personnel costs should be ignored in obtaining data necessary to determine whether rates are excessive. The level of detail required is not specified by the word "financial."

**Summary of Comment (page 3-4):**

The Proposition 103 case, which is cited repeatedly as authority for the data submission regulations, is not helpful to the Commissioner. Proposition 103 expressly excludes title insurance from its purview. Moreover, many differences exist between Proposition 103 and the statutes that govern rate-setting and data collection for title companies. While Proposition 103 sought to do away with open competition by means of a rate rollback and a system of prior approval, the title insurance statutes prohibit regulatory barriers to the free market. Also, as noted previously, the title insurance statutes are not intended to give the Commissioner the power to fix and determine a rate level by classification or otherwise. Additionally, under Proposition 103, rates must be approved prior to their use. Title insurance rates, by comparison, are subject to a file and use system that permits insurers to use the rates 30 days after filing, thereby strengthening the argument that the Commissioner lacks authority to impose massive data-reporting obligations for rate-setting purposes, as opposed to pure financial data.

**Response to Comment:**

The Commissioner rejects this comment. Citation to the Supreme Court's decisions in *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216 and *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805 was not offered as authority for the adoption of regulations covering title insurance. That authority is spelled out elsewhere, principally in Insurance Code section 12401.5. *20th Century* and *Calfarm* are cited for the applicable substantive tests for rate regulation, including the inherent authority to employ regulatory formulae. The Commissioner rejects the implication that the proposed regulations represent a barrier to the free market; companies remain free to compete for business so long as they do not charge excessive rates – a restriction derived from sections 12401 and 12401.3. The allusion to prior approval is inapposite given the fact that the regulations preserve the file-and-use statutory system.

**Summary of Comment (page 4):**

Government Code section 11346.3 provides that state agencies must assess the potential for adverse economic impact on California business enterprises and individuals, avoiding the imposition of unnecessary or unreasonable regulations or reporting, recordkeeping or compliance requirements. Insurance Code section 12401.5(b) suggests that the Commissioner must give due consideration to the systems in use and to the rules and form of the statistical plan so that the requirements may be as uniform as practicable with the plan used by other states. The proposed regulations, however, did not adequately assess these questions.

The proposed regulations will impose an unreasonable and unnecessary economic impact on the commenter's business with minimal benefit to the Department or other insureds. While the regulation provides for new and burdensome data collection requirements, it does not provide any indication that any effort was made to assess the cost or impact of these obligations, nor to compare their form to the requirements in other states.

The commenter conducted a limited analysis of the economic impact of the data collection and recordkeeping provisions for its own business and has attached its analysis as Exhibit C to the comments. The result of this analysis leads the commenter to the conclusion that the proposed changes would be unduly burdensome in terms of employee time and costs involved in making the proposed changes.

**Response to Comment:**

The Commissioner rejects this comment. Possible adverse economic impact was considered, and the Commissioner has concluded that the adverse impact to the economy from excessive title and escrow charges the regulations prohibit more than outweigh the burden of compliance. The Commissioner did give careful consideration to existing systems and has found them grossly inadequate to the task of rate-regulation. In particular, the Department's experience with data requested from existing systems has demonstrated that those systems are inadequate, that data are not maintained in a consistent manner, and that the data presently maintained, to the extent they differ from the requirements of the statistical plan, are not suitable for rate-regulation. The contents of commenter's Exhibit C are addressed separately.

**Summary of Comment (page 4-5):**

The current free market system is competitive and has provided lower prices for consumers. The fact that kickback schemes have led to successful enforcement by the Department merely shows that the enforcement methods are properly preventing such practices. While it may be appropriate to strengthen the penalties for illegal kickbacks, a wholesale revision of the regulatory laws as reflected in the proposed regulations is unnecessary. Rate setting is not permitted by the applicable laws and the Commissioner failed to make the necessary findings to invalidate any existing rates. Finally, the Commissioner has failed to properly consider the economic impact of the proposed rates or proposed data collection methods.

**Response to Comment:**

The Commissioner rejects this comment. The Competition Report commissioned by the Commissioner, like numerous studies before it, has demonstrated that there is not a reasonable degree of competition in the relevant markets. The assertion that successful enforcement actions shows kickback schemes are being prevented is unsupported and contrary to the Department's experience. Increased penalties for illegal practices may well be warranted, but such a statutory change would require legislation and lies beyond the Commissioner's authority. Furthermore, the Competition Report has found that the absence of competition has also led to huge sums being expended on marketing to middle-men that is not prohibited, thereby driving up prices without any consumer benefit.

**SUMMARY AND RESPONSE TO COMMENT ATTACHMENTS**

**Exhibit A: "Competition and Title Insurance Rates in California", prepared by Bruce E. Stangle and Bruce A. Strombom, dated January 23, 2006.**

**Summary of Comment (page 1):**
This section is a summary of the comment and the information contained is discussed in greater detail in later sections.

**Response to Comment:**
Responses to the comments summarized are provided below, so no response to the summary of comments is necessary.

**Summary of Comment (page 1):**
Consumers rarely buy homes and are unfamiliar with title insurance. The demand for title insurance is derived from home purchases, so there is a tight link between home sales and title industry operating revenue. Low interest rates in the past five years expanded home sales, refinancings, and title revenues, but title revenue is also affected by real estate volatility. Over the last 25 years, title industry revenues have dropped significantly in several periods. It is necessary to look over several housing cycles in order to understand the economic performance of the title industry. Since industry conditions are likely to change, it would be unwise to base major policy changes on the peak experience of the past few years.

**Response to Comment:**
The Commissioner rejects this comment. With regards to the assertion that consumers rarely buy homes and are unfamiliar with title insurance, see responses to common comments C.11, C.12, and C.13.

With regards to cycles in the real estate market, the Birnbaum Report is persuasive about excessive profitability and revenue. The argument that revenue and profitability can only reasonably be measured over a lengthy period that covers a real estate cycle is flawed and unreasonable. The premise is that title insurers and investors are willing to accept low profitability in some years because it will even out with high profitability in other years, somehow averaging out over a real estate cycle. This is illogical because title insurers and investors have no idea how long a real estate cycle will take or how high or deep the cycle will go. It is empirically incorrect because title insurance companies do not explain low profitability as a planned event for which they will recover with high profitability a few years down the road. Rather, the national title insurance groups are publicly-traded companies who, like other publicly-traded companies, must deliver profitable results quarter after quarter.

The Birnbaum Report found high profitability for national title insurers over an extended period of time on a national basis and reasonably concluded that profitability in California was as great as or greater than the national average because of the greater growth in transactions and transaction volume than the rest of the country.

**Summary of Comment (page 1-2):**
The commenter introduces title insurance and describes owner's and loan policies. Development of title insurance has improved the availability of mortgage financing and increase home ownership since the 1950s, especially via the growth of the secondary mortgage market.

**Response to Comment:**
This portion of the comment is not specifically directed at the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.)

**Summary of Comment (page 2):**
Title insurance is different from most other insurance in that the premium is paid only once while most other lines require regular payments.

**Response to Comment:**
This portion of the comment is not specifically directed at the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.) To the extent that this comment describes consumers' lack of familiarity with title insurance

**Summary of Comment (page 2):**
Over a 14-year period of ownership, the premiums for homeowners insurance total over $31,000 compared to $1,552 for title insurance, so the price of title insurance is relatively modest.

**Response to Comment:**
The Commissioner rejects this comment. Homeowners and title insurance are different products, and the fact that they are both connected to real estate does not imply that they should cost similar amounts. The comparison has no meaning in the context of whether or not title insurance premiums are excessive.

**Summary of Comment (page 2):**
The commenter notes their affiliation with First American Title Insurance Company and notes the topics to be mentioned in greater detail later in the comment.

**Response to Comment:**
This portion of the comment is not specifically directed at the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.)

**Summary of Comment (page 2):**
Title insurers offer discounts below base rates, demonstrating the existence of price competition. File rates also vary across firms, providing price choices for buyers and indicating price competition.

**Response to Comment:**
The Commissioner rejects this comment. Commenters have provided no evidence to support the claim that consumers typically pay prices substantially below base rates. The Commissioner's review of filed discounts is that most discounts are narrowly defined and limited in applicability.

The Birnbaum Report analyzed rate filings and rate changes over time and found not only little diversity among insurers in price, but virtually no change over time. In fact, the changes that did occur were rate increases for companies after a merger to make the acquired company's prices equal to the acquiring company's prices. The absence of price competition was evidenced not by a narrow range of prices among insurers at a particular point in time, but by the absence of change over time and the absence of any company to use a price change as a method for gaining more market share.

**Summary of Comment (page 2, 6-7):**
Prices for title insurance in California are among the lowest available in any large state, including states with rate regulation. Looking at the price of title insurance for the median price home in the US in the ten largest states, California is the third lowest-priced state in the group. Georgia has a lower price since the two elements of title insurance (title search and underwriting) are priced separately and the comparison only includes the price of insurance risk. Illinois also has a lower price, and it and Georgia are the only states in the ten largest without regulation of title rates. Texas and Florida both have rates set by the state insurance commissioner that are much higher than those found in California. Prices for title insurance in California are therefore not excessive in comparison to other states. The data suggest that prices tend to be higher in states with greater regulation and lower in states where title insurance is unregulated.

**Response to Comment:**
The Commissioner rejects this comment. The survey of settlement statements is not relevant or probative for several reasons. First, the comparison across states is not applicable because of the factors cited by commenters, including a note that "price comparisons with George are meaningless because the rate available there is not all-inclusive as discussed above." Also, the comparison to other states is not relevant because the Commissioner is responsible for ensuring that rates in California are not excessive. Comparisons to other states provide no information to the Commissioner about the reasonable cost basis for rates in California.

The Commissioner also rejects the comment about "greater regulation." First, the commenters made no analysis to indicate whether rate regulation resulted in lower rates in those three states that would have occurred in the absence of rate regulation. Consequently, they are in no position to draw any conclusions about rate regulation lowering prices in the long run. Second, the Commissioner has a statutory responsibility to ensure that rates are not excessive and has found that a reasonable degree of competition does not exist and that a rate which exceeds the maximum permitted rate

pursuant to the proposed regulation is unreasonably high for the insurance or other services provided

**Summary of Comment (page 3):**
Many industries with only a few firms are highly price competitive, and the data for the California title insurance industry show extensive price competition.

**Response to Comment:**
The Commissioner rejects this comment. In this section, the commenters do not provide any evidence to support their assertion or refute the Birnbaum report. The Commissioner finds that the analysis of competition in the Birnbaum Report is persuasive and makes economic sense.

**Summary of Comment (page 3):**
There are no significant barriers to entry or expansion, so if prices were excessive, entry could hold down prices.

**Response to Comment:**
The Commissioner rejects this comment. In this section, the commenters do not provide any evidence to support their assertion or refute the Birnbaum report. The Commissioner finds that the analysis of barriers to entry in the Birnbaum Report is persuasive and makes economic sense.

**Summary of Comment (page 3):**
Marketing to third parties has historically been the most economical channel to provide title insurance to homeowners.

**Response to Comment:**
See responses to common comments C.12, C.13, and C.14.

**Summary of Comment (pages 2, 3-4):**
Filed rates for title insurance have declined as a percentage of home purchase prices, and the decline has accelerated in recent years. Price declines for loan policies for refinancing have been even greater. These declines are based on filed base rates, and Californians typically pay prices far below these rates, so changes in base rates understate the actual decline in prices. Total premiums paid for title insurance have increased as home prices have increased over time, but premiums have increased much less than home prices.

**Response to Comment:**
The Commissioner rejects this comment. The key measure of price changes is change in price for the median-priced transaction over time as this is the measure of what consumers pay for a comparable product over time. The fact that liability – claim costs – are a small portion of title insurance premium is reflected in the stepped rate schedules employed by title insurers in which the cost per $1,000 of coverage declines as the size of the transaction increases. This declining step rate schedule reflects the fact that the

increase in the size of the transaction adds little cost to providing title insurance because the bulk of the costs remain the same, including search, examination, underwriting, sales, marketing, and administration. Again, using the median price values cited by commenters, a consumer purchasing a median priced home would have paid 66% more for the title insurance policy in 2005 than in 2000 with the change in liability accounting for only 3% of the change. During a period in which general inflation was about 13%, the increase in the premium paid was unreasonable and excessive and confirms the Birnbaum Report's conclusion that a reasonable degree of price competition does not exist in California title and escrow markets.

Commenters have provided no evidence to support the claim that consumers typically pay prices substantially below base rates. The Commissioner's review of filed discounts is that most discounts are narrowly defined and limited in applicability. Further, the commenters have not indicated when consumers allegedly started paying prices below base rates. If the alleged discounts were present in 2000, for example, then the comments would be incorrect for the 2000 to 2005 period.

**Summary of Comment (pages 4, 6):**
Changes in product quality must be noted when examining price changes to avoid biased results. In title insurance, quality includes the level of coverage in the policy and the level of service to customers. Even if prices are constant, an increase in quality is effectively a decrease in the price per unit of quality. Much like the US Bureau of Labor Statistics adjusts Consumer Price Index calculations for quality changes over time, improvements in title insurance coverage must be noted when examining price changes over time.

As coverage for basic policies has grown over time, the effective price per unit of coverage has declined. The price comparisons between different periods reported understate the price decline because greater coverage is currently provided relative to past periods.

**Response to Comment:**
The Commissioner rejects this comment. The basis for the commenters' claim of increased coverage is a chart supplied to them by First American. The commenters' do not indicate any independent analysis of changes in coverage. In fact, while there has been some increase in coverage over time, there have also been limitations on coverage.

**Summary of Comment (pages 4-5)**
The price of a CLTA Standard Coverage policy is often used as a base rate when comparing title insurance prices and can be thought of as list prices rather than actual transaction prices. Most consumers purchase title insurance below the base rate, so an analysis of price competition that uses these rates is flawed. The effective rates for title insurance have declined over time as reduced price programs have been introduced or expanded though base rates might not have changed.

**Response to Comment:**

The Commissioner rejects this comment. Commenters have provided no evidence to support the claim that consumers typically pay prices substantially below base rates. The Commissioner's review of filed discounts is that most discounts are narrowly defined and limited in applicability. Further, the commenters have not indicated when consumers allegedly started paying prices below base rates. If the alleged discounts were present in 2000, for example, then the comments would be incorrect for the 2000 to 2005 period.

**Summary of Comment (page 4):**
The pricing analysis in the Birnbaum report to the Commissioner is fundamentally flawed in three respects: it only includes base rates; it does not account for title insurance quality changes; it does not account for inflation.

**Response to Comment:**
The Commissioner rejects this comment. The assertions that the Birnbaum is flawed in that it includes only base rates and that it does not account for title insurance quality changes are elaborated in more detail elsewhere in this comment, and responses can be found in those sections. With regards to inflation, the Birnbaum report notes that housing inflation has raised title premiums faster than rising costs to title insurers would justify, so the commenter's assertion is unfounded.

**Summary of Comment (page 5-6):**
The commenter lists and defines several title insurance discount rates:

- Short term rates in which an earlier policy had recently been issued;
- Affordable home ownership rates that offer discounts to low to moderate income families;
- First time buyer and senior discounts;
- New lower priced policy forms including first American'e EagleEDGE policy that provides the same coverage as the CLTA/ALTA Homeowner's policy at a 20% lower price;
- Automated issuance programs for which insurers offer lower prices to lenders that submit a high volume of orders electronically.

Title insurers also introduced reductions in refinance loan policy prices. These discount rates and new refinance loan policies provide clear evidence of price competition in the title insurance industry.

**Response to Comment:**
The Commissioner rejects this comment. There is no evidence to support the claim that rates have dropped to any meaningful extent in California. If the various claims made by commenters about the large number of rate cuts, new discounts and low-cost policies were true, the average premium per policy should be declining. Yet, even if the discounts cited by commenters are applied to their 2005 median price example, the premium for the median price transaction would still have increased substantially from 2000 levels without the discount. The Commissioner's review of rate filings made by title insurers, including requests for information to filing companies for impact analyses of various discounts, contradicts the claims of commenters. Filing companies are typically unable to identify the number of consumers receiving a particular discount. More important,

filing companies misrepresent the overall rate impact of filings. In one instance, a Fidelity company made a filing in late 2006 claiming the filing represented an overall reduction of over 20%. In fact, the filing resulted in an overall rate increase of about 1% to 2%. The commenters claim that reduced pricing programs, lower-priced products and reductions in rates provide clear evidence of price competition is unsupported and rejected by the Commissioner in the face of clear evidence that home price escalation has dramatically increased the price paid by consumers for title insurance and dramatically increased title insurance premiums collected by title insurance companies.

**Summary of Comment (page 6):**
Comparisons of title insurance prices across states are complicated by differences in the level of insurance coverage between states and the set of services included in title insurance products in different states. A meaningful comparison must consider both effects. In California, the level of coverage is among the greatest of any state and the bundle of services available in California is among the most comprehensive.

In addition to these two factors, prices may vary for a number of other reasons including differences in the cost of inputs such as labor, the quality of title records, the expected loss ratio, the degree of regulation, and the level of demand.

**Response to Comment:**
The discussion of comparisons between California and other states appears in greater detail elsewhere in the comment, and a response can be found for those sections, so no response is required here.

**Summary of Comment (page 3, 7-8):**
Profit rates for title insurance holding companies were less than other insurers, homebuilders, and the Standard & Poor's 500 in the period 1995-2004 and indicate no lack of competition in title insurance markets. Mergers and acquisitions have reduced the number of insurers, but there is no necessary connection between the number of firms and price competition.

Return on equity is another measure of profitability in which after-tax profits are divided by the book value of shareholders' equity. This measure does not provide evidence of excessive profits for title insurance holding companies, and they show a return on equity lower than that of homebuilders and the S&P 500 but greater than property and casualty insurers. These comparisons likely overstate the profitability of insurance because title insurance holding companies have diversified into newer, more profitable lines of business.

The comparison of the profitability of title insurance holding companies with other industries supports the conclusion that the markets for title insurance are competitive.

**Response to Comment:**
The Commissioner rejects this comment. The proper standard against which to measure reasonable profitability is the cost of capital required by the title insurance company. The

fact that title insurers may have earned a lower profit than other industries does not negate the fact that title insurers earned profits well in excess of the reasonable cost of capital for an extended period of time. The use of profit as a percentage of sales is not a valid measure for comparing profitability across industries because the measure does not consider the capital at risk. As stated in the response to the previous comment, the stated profitability greatly understates the actual profitability of title insurers and underwritten title companies. An expanded and elaborated response related to a superset of this argument is included in the responses to the Stangle and Strombom's August 20, 2006 report entitled "An Assessment of Competition in California Title Insurance and Escrow Markets."

**Summary of Comment (pages 8-9):**

The commenter summarizes the various factors to consider when evaluating the degree of competition in a given market. The declining number of title insurance companies over the past twenty five years as a result of mergers is also evident in other industries where there is a high degree of price competition. To protect consumers, mergers in the title insurance business must be approved by federal authorities and state commissions. If the regulators had reasons to expect adverse effects on competition, the mergers would not have been approved. The entry of new suppliers during a period of exceptional profits, as in the increase in the number of underwritten title companies, is an indication of competition in the California title industry.

**Response to Comment:**

The Commissioner rejects this comment. The approval of mergers by regulators over the past 25 years is not evidence of a reasonable degree of competition in California title insurance and escrow markets today. Federal antitrust regulators examine a merger to determine if the merger will less competition and do not evaluate whether the pre-merger market is reasonably competitive. State regulators may be subject to statutory requirements to approve mergers if certain conditions are met, regardless of competitive impact. The Commissioner disagrees with the count of underwritten title companies in 2004 and 2005 cited by commenters. In fact, several independent underwritten title companies have been acquired by national title insurers over the past few years and virtually every new "entry" has been an affiliated business arrangement between a title insurance company and an entity able to refer business, including homebuilders and large real estate agencies.

**Summary of Comment (pages 9-10):**

Evidence of "few firms" in a market cannot serve as a basis for predicting the absence of price competition. There are many economic reasons why few firms compete in certain markets. Everyday example of industries with few firms and intense price competition include "aircraft, beer, and soft drinks." Two firms are sufficient for competitive price to flourish.

Inferring price competition from the number of sellers ignores the buyers' side of the market; large buyers in a market of few sellers provide "a countervailing force that blocks prices from being raised above the competitive level." These buyers, large lenders like

Citibank, Chase, and Bank of America, can demand the lowest prices available, thereby preventing pricing above the competitive level.

**Response to Comment:**
The Commissioner rejects this comment. The commenter mischaracterizes the Birnbaum Report, which did not infer an absence of price competition from the small number of firms operating in the market. The Birnbaum report considered a number of factors, including the buyer's side of the market. The commenters reinforce the analysis of the Birnbaum Report by describing the market power of large lenders who do wield market power because of their ability to deliver a large amount of business to title insurers and escrow providers. The commenters err by claiming that these large lenders are buyers and demand competitive pricing. Lenders do not pay for the title insurance premium or escrow charge and benefit from inflated pricing because the extra revenue collected by title insurers can be used to provide consideration to the lenders – and other referrers of business. The frequent occurrence of illegal rebates as well as affiliated business arrangements which funnel money and other considerations to the referrers of business is evidence that the market power of large lenders does not translate into lower prices for the paying consumer.

**Summary of Comment (page 10):**

A barrier to entry or to the expansion of existing firms allows incumbents to sustain above competitive prices. The commenter asserts that there were historic barriers to entry that have been removed and there are ubiquitous costs that are not technical barriers to entry. However, entry to the title insurance market may be limited if there are large economies of scale relative to the size of the market, restricting the number of firms that can profitably compete.

**Response to Comment:**
The Commissioner rejects this comment. The commenters note that access to title plants is not a barrier to entry in larger counties, but fail to note the caution in the Birnbaum Report that ownership of the plant can convey a substantial competitive advantage by creating much different costs for title plant access between owners and subscribers. The commenters' analysis of access to title plants in small counties is incorrect. If it is uneconomical to create a new title plant in a county because of the relatively small number of transactions, then access to the title plant of an incumbent is a barrier to entry. If the incumbent allowed access to the title plant – as with joint plants in large counties – it would be possible for a new firm to enter the market.

The commenters confuse competition for customers, which occurs in a normally competitive market, with competition for the referrers of business, which occurs in the reverse competitive markets of title insurance and escrow. The commenters misrepresent the nature of this competition by describing it as a buyer-seller relationship because the buyer – the consumer paying for the product – is not the target of competition by the seller. The Birnbaum Report shows how access to the referrers of business is a barrier to entry, as evidenced by the facts that virtually all new underwritten title companies are affiliated business arrangements that allow a title insurance company to lock in referrals from a real estate professional and that title insurers are more like to purchase business by acquiring

underwritten title companies and paying huge sums to hire senior staff from other companies who will bring business with them.

**Summary of Comment (page 11):**

Third party marketing, the use of "middlemen," serves a useful purpose in many markets. These middlemen lower the costs of distribution and exchange of economic goods and services, they provide quality and price information and match consumers to providers, and often reduce search costs for both sellers and buyers. EBay is on such example.

With the application of the term "reverse competition" to the title insurance industry, the implication was that title insurance providers should market directly to homeowners rather than use third party for referrals. But marketing to homeowners is also costly. Originally, a number of negative and anti-competitive connotations were attached to the term "reverse competition" but as a result of many changes the real estate and banking industries it is not clear "that 'reverse competition' adequately describes the title industry as of 2006."

There are many industries where middlemen operate to pass on recommendations regarding quality and price and their use is a respected business practice. For example, middlemen were historically used in the pharmaceutical industry, with drugs marketed to physicians rather than consumers. Referrals and reliance on expertise is also important with professional services and in many other areas, including those areas related to real estate. Many of these same conditions that apply in other industries apply to the title insurance industry. It is not economical for a single homeowner to search the market for all those services required for home financing, and many residential customers do not have the expertise necessary to make an informed choice about title insurance and would rather rely on another's expertise. Lenders and realtors want to create good will with their customers and have no incentive to see those customers pay more for closing costs, including for title insurance.

Marketing to third parties is the most efficient way to attract homeowners. If there were more economical methods, title insurance firms would be implementing them to reduce costs.

**Response to Comment:**
Reverse competition" is a well-established concept in insurance economics and has been used to describe the market structure of title insurance and credit insurance markets for at least 30 years. The term has been used, in reference to title insurance, for nearly 30 years, apparently first having been coined by the 1977 Department of Justice study. Since then, it was repeated in several other studies, including the Peat Marwick report for HUD and the California Insurance Commissioner's Bulletin 80-12. The term has been codified in regulations, including the New York State credit insurance regulation and has been used and defined in work products of the National Association of Insurance Commissioners. In addition, the comment mischaracterizes reverse competition. Reverse competition does not refer to consumers seeking advice of third parties; it refers to a market structure in which the seller markets the product to a third party who refers

the paying customer to the seller, the consequence of which is that the referrer of the business has the market power and is able to extract considerations from the seller who passes the cost of the considerations onto the paying consumer who has no market power to discipline the pricing of the seller.

**Summary of Comment (page 13):**

The commenter gives a brief overview of title insurance rate regulation in the United States. The commenter also states that if the Department promulgated title insurance rates in California, a number of negative effects would ensue, including: (1) the decrease in and ultimate disappearance of the number of reduced price offerings; (2) no incentive to innovate with new products; (3) tremendous resources being brought to bear on formal rate hearings; (4) price competition ending, consumers paying a higher price for an inferior product, and greater expenditures on marketing to third parties (the very behavior that the Birnbaum report finds harmful to consumers).

The evidence suggests that explicit rate regulation of title insurance in California would harm consumers with higher prices and fewer product offerings.

**Response to Comment:**
The Commissioner rejects this comment. With regards to the disappearance of reduced price offerings, see Common Comment T.2. With regards to decreased incentive for innovation, the commenter offers no evidence that the proposed regulation will decrease incentives for innovation, and the proposed regulations preserve the ability of companies to employ cost-justified discounts. The regulatory costs for eliminating excessive rates are insubstantial given the evidence that the excessive rates amount to hundreds of millions of dollars a year. The claimed end to price-competition ignores the Commissioner's finding that there is no price-competition today – a finding that is substantiated by the numerous industry witnesses touting non-price-competition.

**Summary of Comment (page 14):**

The commenter provides descriptions of the comment authors and their qualifications.

**Response to Comment:**

This portion of the comment is not specifically directed at the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.)

**Summary of Comment (pages 15-22):**

The commenter provides a copy of Exhibit 1 through Exhibit 7 to the comment.

**Response to Comment:**

This portion of the comment reflects comments that are summarized and responded to in greater detail above. No response is, therefore, necessary. (Gov. Code section 11346.9.)

**Exhibit B: "Incorrect Conclusions About Competition in the California Title and Escrow Markets Asserted in the December 2005 Contractor Report to the California Insurance Commissioner", prepared for the American Land Title Association by Dr. Nelson R. Lipshutz dated January 5, 2006.**

**Summary of Comment (all pages):**

The commenter provides a critique of the Birnbaum Report.

**Response to Comment:**

All of the comments in this document are repeated in the document "Incorrect Conclusions About Competition in the California Title and Escrow Markets Asserted in the December 2005 Contractor Report to the California Insurance Commissioner, Nelson Lipshutz," dated August 30, 2006. The responses to the comments are provided in the response to comments in the August 2006 document. Those summaries and responses are set forth directly below.

**Lipshutz August 06 comments on competition report**

**Summary of Comment (executive summary):**

The commenter provides an executive summary of his comments.

**Response to Comment**:

Responses to the comments summarized in the executive summary are provided below, so no response to the summary of comments is needed.

**Summary of Comment (page 1):**

The commenter describes the nature of his engagement by the American Land Title Association

**Response to Comment:**

This portion of the comment is not specifically directed at the Commissioner's proposed regulations or to the procedures followed in proposing the regulations. No response is, therefore, necessary. (Gov. Code section 11346.9.)

**Summary of Comment (pages 1-2):**

The Birnbaum Report incorrectly asserts that reverse competition is a unique feature of title insurance rather than a standard type of marketing to distributors used by many industries.

**Response to Comment:**

The Commissioner rejects this comment. Reverse competition is a well-established concept in insurance economics and has been used to describe the market structure of title insurance and credit insurance markets for at least 30 years. The term has been used, in reference to title insurance, for nearly 30 years, apparently first having been coined by the 1977 Department of Justice study. Since then, it was repeated in several other studies, including the Peat Marwick report for HUD and the California Insurance Commissioner's Bulletin 80-12. The term has been codified in regulations, including the New York State credit insurance regulation and has been used and defined in work products of the National Association of Insurance Commissioners. In addition, the comment mischaracterizes reverse competition. Reverse competition does not refer generally to marketing to distributors nor to consumers seeking advice of third parties; it refers to a market structure in which the seller markets the product to a third party who refers the paying customer to the seller, the consequence of which is that the referrer of the business has the market power and is able to extract considerations from the seller who passes the cost of the considerations onto the paying consumer who has no market power to discipline the pricing of the seller.

**Summary of Comment (page 2-3):**

Title companies do market extensively to consumers through their websites on the internet. But title and escrow companies have found that direct advertising to the public is of limited efficacy. Lenders' advertise low closing costs to consumers directly and it is becoming less frequent for lender's title insurance costs to be passed through to borrowers as new loans originate on a no closing cost basis. In such cases, the lender is strongly motivated to shop for the best price because it can recover its costs only through interest rates.

**Response to Comment:**

The Commissioner rejects this comment. The existence of title insurance company and underwritten title company web sites does not equate to direct marketing to the consumers who pay for the products and services. Rather, the web sites are directed at the "customers" of the title insurers, underwritten title companies and escrow providers – where "customers" are understood to be participants in the real estate process other than the paying consumer. The fact that direct marketing to consumers is of limited efficacy is a function of the structure of title insurance markets, the nature of the product and the nature of the purchase. Such inefficacy, however, does not justify the unreasonable marketing expenses by title insurers and underwritten title companies to secure the referrals of business. In theory, lenders who do not pass along the cost of title insurance

as a separate charge to consumers should have an incentive to seek the lowest title insurance rates from title insurers. The commenter has provided no evidence, however, that this market dynamic is actually occurring or that lenders are pushing for lower rates from title insurers. Lenders would retain an interest in higher title insurance rates if the quid pro quo was free services and other considerations – the types of considerations found in illegal kickbacks and other free services today.

**Summary of Comment (page 3-4):**

The Birnbaum Report misinterprets the behavior of California title insurance prices as evidence for the absence of price competition. The actual range of prices found in the market is greater than those included in the Birnbaum Report, particularly for escrow. In a highly competitive market, prices charged will be close together. The Report's review of base rates and single refinance plan fails to capture the price competition found in special discounts.

**Response to Commenter:**

The commenter mischaracterizes the Birnbaum Report conclusion about base rate changes over time. The Birnbaum Report analyzed rate filings and rate changes over time and found not only little diversity among insurers in price, but virtually no change over time. In fact, the changes that did occur were rate increases for companies after a merger to make the acquired company's prices equal to the acquiring company's prices. The absence of price competition was evidenced not by a narrow range of prices among insurers at a particular point in time, but by the absence of change over time and the absence of any company to use a price change as a method for gaining more market share. There is no evidence to support the claim that various discount programs have had a meaningful impact on prices in California. The Commissioner's review of rate filings made by title insurers, including requests for information to filing companies for impact analyses of various discounts, contradicts the claims of the commenter. Filing companies are typically unable to identify the number of consumers receiving a particular discount. More important, filing companies misrepresent the overall rate impact of filings. In one instance, a Fidelity company made a filing in late 2006 claiming the filing represented an overall reduction of over 20%. In fact, the filing resulted in an overall rate increase of about 1% to 2%. The companies included in the price comparison in the Birnbaum Report account for the vast majority of market in California. Other, smaller companies either serve a niche or captive market associated with affiliated business arrangements or otherwise have little impact on the overall outcome of the market. Most important, there is no evidence to indicate that any insurer has used lower prices to gain market share.

**Summary of Comments (page 6-7):**

The Birnbaum Report incorrectly characterizes barriers to entry. Established business relationships are generally not a barrier to entry.

**Response to Comment:**

The evidence indicates that established business relationships with entities in the position to refer title and escrow business are a barrier to entry. Such evidence includes the fact that virtually every underwritten title entry in the past six years has been an affiliated business arrangement with an entity with established business relationships. Other evidence includes the prevalence of expensive "recruitment" of key title and escrow personnel from competitors who bring large blocks of business when they switch companies.

**Summary of Comment (pages 7-8):**

Entry and exit from the escrow and title business has been extensive. Data from the Department of Corporations on independent escrow companies show 90 entries in 2004 and 1,001 in 2005. Exit is also easy and plentiful.

**Response to Comment:**

The Commissioner rejects this comment. The data provided by the commenter provides no information about substantive entry in the market, understood as a new competitor adding supply capacity that previously did not exist. The Commissioner's review of independent escrow company licensing activity shows that the largest independent escrow companies – those with the greatest number of branches and the most escrow volume – are affiliated with title insurance companies or underwritten title companies. Further, the review found that many new companies were simply established escrow officers leaving another company to open their own business, indicating that the profitability of escrow exceeded the inefficiencies of establishing a one-person company. Further, the presence of independent escrow companies is almost entirely limited to six Southern California counties and, consequently, does not affect the escrow markets in the remaining 52 counties. Further, the presence of hundreds of independent escrow companies has not produced any price competition as the prices in the six counties where hundreds of independent escrow companies operate are twice the prices in northern California counties with no independent escrow companies and fewer than dozens of escrow providers.

**Summary of Comment (page 9-11**):

New underwritten title companies have entered the market and existing underwritten title companies have expanded to other counties, indicating ample entry.

**Response to Comment:**

The Commissioner rejects this comment. The commenter's analysis is incorrect because it fails to recognize that the new underwritten title companies were uniformly affiliated business arrangements that added no new capacity to the system. The analysis of expansion to other counties is also incorrect because it fails to account for the retirement of an affiliated underwritten title company in a county where a new license has been

granted to the expanding underwritten title company. In this case, there is no real entry and no new capacity, but only a rationalization of operations by the parent. The analysis of expansion is also incorrect because it fails to account for independent companies leaving the market due to acquisition and, consequently, fewer entities in the market. Moreover, the commenter has failed to provide any evidence that the claimed entries provided any new source of price-competition.

**Summary of Comment (page 11):**

The Birnbaum Report places undue emphasis on concentration in the market. High concentration itself is not an indicator of lack of competition. Concentration is better measured by underwritten title company and independent escrow company market share.

**Response to Comment:**

The Commissioner rejects this comment. The Birnbaum Report used the HHI as only one indicator of competition and market structure, among several others. Consequently, the claim that undue emphasis was placed on the measure is a mischaracterization of the Report. However, the Report found very high HHI values, indicating a very concentrated market. While high market concentration alone does not indicate a lack of price competition, the absence of price competition is much more likely in a market with a few companies controlling the market than in a market with many players with small market share. The market shares of title insurance companies are clearly the appropriate measures of market concentration for title insurance. The market share of distributors of the product is not the appropriate measure, in the same way that the market shares for auto insurance are appropriately calculated by the market shares of auto insurance companies as opposed to market shares for auto insurance agents.

**Summary of Comment (page 12):**

The Birnbaum Report incorrectly asserts that the title insurance industry is earning excessive profits without any consideration of the level of profits appropriate for the industry. Rates of return for the Dow Jones, S&P 500 and selected consumer product companies and consumer service industries were higher than those for title insurers and underwritten title companies.

**Response to Comment:**

The Commissioner rejects this comment. First, the comment is factually incorrect. The profitability cited -- return on equity -- for underwritten title companies and title insurers was generally greater than returns available from an investment in the S&P 500. The fact that there may be other industries experiencing even higher returns on equity does not refute the fact that UTC profits are excessive and super-competitive. Moreover, the comparison is inappropriate because the proper measure of comparison is not what other industries have earned, but what the reasonable rate of return was on an industry subject

to rate regulation. During the period studied, the reasonable after-tax rate of return that would have been used in establishing reasonable rates for title insurance would have been in the range of 10% to 12% -- far less than the returns earned by title insurers and underwritten title companies and, consequently, indicating excess profitability of title insurers and underwritten title companies. In addition, the reported profitability of title insurers and underwritten title companies greatly understates the profitability of the title and escrow industry for several reasons. First, many owners of underwritten title companies take profit as salary, bonus or commission, which reduces the stated profitability by turning profit into an expense. Second, there are many affiliate transactions among underwritten title companies, title insurance companies and other affiliates, some of which result in double-counting of expenses, some of which reflect profit reported as an expense, such as a management fee, and some of which are inflated expenses for services provided. Third, and most important, profitability, understood as the difference between revenue and the reasonable cost of providing a service, is greatly understated because title insurers and underwritten title companies spend the bulk of what would otherwise be profit on expenditures that benefit the referrers of title and escrow business. This "profit" is spent on illegal kickbacks as well as legal expenditures that provide no benefit to the consumer paying for the product, but greatly benefit the real estate agents, mortgage brokers, lenders and homebuilders who are in the position to refer business to title insurance companies and underwritten title companies. The evidence of such expenditures is found in the captive reinsurance schemes under which title insurance companies rebated almost half of the title insurance premium to homebuilders and in the very large percentage of personnel costs devoted to sales, marketing and consumer support, where consumer support is the industry term used to describe free services to those entities considered "customers" by title insurance companies and underwritten title companies -- namely, real estate agents, mortgage brokers, lenders and homebuilders.

**Summary of Comment (page 13):**

The Birnbaum Report incorrectly asserts that the lack of immediate rate response to changes in costs in indicative of a lack of competition. The industry is highly cyclical and title insurers adjust their rates to compensate for secular trends in long-run marginal cost to generate an adequate profit on average over the real estate cycle. During the 1980-1990 period the title industry had a return on equity which averaged 6%, less than the return on riskless Treasury bonds.

**Response to Comment:**

The Commissioner rejects this comment. The industry profitability for the 1980's is inapplicable for several reasons. First, investors do not look to returns from twenty years ago to judge the profitability of an industry today. Recent profitability is clearly a better indication of the prospects for an industry. Second, the results of the 1980's were skewed by unique events related to the Savings & Loan scandals, including devastated real estate markets in many states and historically unprecedented losses resulting from S&L fraud. Third, the premise behind the comment is flawed and unreasonable. The premise is that title insurers and investors are willing to accept low profitability in some years because it

will even out with high profitability in other years, somehow averaging out over a real estate cycle. This is illogical because title insurers and investors have no idea how long a real estate cycle will take or how high or deep the cycle will go. It is empirically incorrect because title insurance companies do not explain low profitability as a planned event for which they will recover with high profitability a few years down the road. Rather, the national title insurance groups are publicly-traded companies who, like other publicly-traded companies, must deliver profitable results quarter after quarter. There is no evidence to support the claim that title insurers have a long-term horizon when determining rates in California.

**Summary of Comment (page 15):**

The Birnbaum Report presents no analysis of cost trends, but relies on an article from A.M. Best. Automation does not necessarily result in lower costs.

**Response to Comment:**

The Commissioner rejects this comment. The Commissioner rejects this comment. In a competitive market, only those technological advances that reduce cost will ordinarily be purchased. There is no reason to doubt that the technology being purchased in this industry is lowering the cost of providing the product. Title search is a good example. No one can reasonably deny that the widespread replacement of hand-searching of titles with computer-searching of digital records has greatly reduced the cost of providing title insurance. The fact that these cost savings have not been accompanied by commensurate price-reductions confirms the absence of price-competition and the need for regulation. Further, the study cited by the Birnbaum Report was prepared by the American Land Title Association – the trade association of title insurance companies – and the A.M. Best Company – an organization that analyzes and rates the solvency and investment potential of insurance companies. It is reasonable to rely upon the conclusions in this study about lower operating costs due to automation, perfection of title, and greater volume.

**Summary of Comment (pages 15-16):**

The Birnbaum Report does not acknowledge that the monoline requirement for title insurance companies is an important consumer protection.

**Response to Comment:**

The Commissioner rejects this comment. The fact that a monoline requirement is a barrier to entry does not conflict or contradict the requirement's role as a consumer protection. Even if the commenter's argument about the benefits of the monoline requirement is accepted, it does not negate the fact that the requirement is a barrier to entry.

**Exhibit C: "Analyses of Data Collection Proposal"**

**Summary of Comment (pages 1-3):**

American Guaranty has independently analyzed, to the extent possible, the economic impact of the data collection and recordkeeping provisions. Our analysis concludes that the proposed changes would be unduly burdensome in terms of employees and costs involved in making these changes. The analyses for some of the specific proposals are attached hereto as Exhibit C. Exhibit C provides a narrative description of the company's current ability to collect and report the data for Tables TI01 through TI17.

**Response to Comment:**

The Commissioner rejects this comment. The information required in the proposed regulation is either information routinely collected by underwritten title companies, information that should be routinely collected as part of sound business practice or information required by statutory requirement. For example, the Exhibit C analysis states that the company does not collect the information for Report TI17 on title insurance forms, endorsements, discounts and surcharges. Report TI17 asks for the title insurance company to submit a list of insurance policy forms, endorsements, discounts and surcharges used during the reporting period. It is unreasonable for a reporting company to not know what policy forms, endorsements, discounts and surcharges it uses and be able to provide such a report. This is information used daily in the ordinary course of business by the company. The response is both unreasonable and implausible. Further, the commenter has not identified any specific data elements in any of the tables that are difficult to collect or report, but has only provided vague statements that data are not available.

The commenter admits that it utilizes transaction management software – GATORS. The purpose of this software is to track transactions in real time and assist participants in carrying out the transactions by carrying out functions and adding information electronically. The commenter states that the current GATORS system does not capture one data element out of a total of 28 in Report TI01, but states that there is not guarantee that GATORS will modify the software to capture this last data element. This is an implausible statement given that GATORS, like other transaction management software vendors design their products to be easily customizable for individual clients.

However, the statistical plan has been revised to eliminate the reporting of data elements in Tables TI01 and UTC01 that LandAmerica, as well as other title insurance companies and underwritten title companies have said are difficult to collect. In addition, the Commissioner has extended the implementation of the reporting requirements by a year to ease the burden on reporting companies and to enable reporting companies to modify existing systems in the ordinary course of business.

The commenter provides only a general statement that the proposed reporting requirements will be burdensome and costly, but does not provide any estimates of the cost. While the introduction of any new reporting requirement brings a new cost, the proposed reporting requirements have been designed to minimize the cost to reporting

companies while providing the Commissioner with information essential for rate regulation. The proposed statistical plan is designed to specifically avoid the need to issue special data calls in the future which are very costly to reporting companies and do not produce data as reliable as data reported pursuant to a routine statistical plan. Finally, the cost of compliance is modest compared to the greater than $4 billion in revenue for the title and escrow industry in California.

**Volume 1, Comment Bates Pages 154-179:**

**Commentator:** J. Robert Hunter, on behalf of the Consumer Federation of America, the California Reinvestment Coalition, Consumer's Union and the National Association of Consumer Advocates
**Date of Comment:** Received 8/30/06
**Type of Comment:** Written

This comment was entirely in support of the regulations. No response is, therefore, necessary.

**Comment Bates Pages 230-257:**

**Commentator:** Cathi Comas
**Date of Comment:** Dated 8/05/06 (no indication when received)
**Type of Comment:** Written

**Summary of Comment (pages 1-2):**

The commenter thanks Bryant Henley for his assistance. Paragraph two, on pages 1 and 2, provides an overview of the escrow industry, and discusses regulation of escrow companies by the Department of Corporations, the Department of Insurance and the Department of Real Estate. The commenter acknowledges that fees charged by escrow divisions within title insurance companies and real estate brokerage houses are less than independent escrow companies.

**Response to Comment:**

This portion of the comment is not specifically directed at the Commissioner's proposed regulations or to the procedures followed in proposing the regulations, or simply summarizes comments which are summarized and responded to in more detail below. No response is, therefore, necessary. (Gov. Code section 11346.9.)

**Summary of Comment (page 2):**

There is no "honest correlation" between the economic principle of "inadequate competition," a contention of excessive fees, and the need to regulate fees. This position was not well-supported. Instead, it would appear that the Department has projected an

attitude of being upset that fees were so high and come to the conclusion that someone must be cheating.

**Response to Comment:**

The Commissioner rejects this comment. The commenter appears to misunderstand the relationship of competition and excessive rates in the statute. The finding of an absence of a reasonable degree of competition gives the Commissioner the authority to find a rate excessive "the rate is unreasonably high for the insurance or other services provided" (Insurance Code section 12401.3). It does, of course, imply a legislative policy that assumes competition keeps rates from being excessive and the absence of competition creates the opportunity for firms to charge excessive rates. The commenter may disagree with that assumption, but it is found in the statute and is beyond the Commissioner's authority to question.

**Summary of Comment (page 2):**

You explained that because the cost of homes had increased and title and escrow fees are tied to the cost of homes, there had been a "price creep" disproportionate to the product offered, making fees excessive. The percent, the real fee, has not changed; only the dollar amount has changed. Therefore, the reasoning seems disingenuous to me. If the price of houses is going up, liability also increases dollar for dollar to the price of that transaction.

**Response to Comment:**

The Commissioner rejects this comment. The fact that the percentage of the home price has not changed in the rate is irrelevant. The relevant quantity is the cost to consumers for the title policy or escrow service, and the sharp increase in home prices will yield much higher consumer costs, which can be justified only if the costs of providing title insurance and escrow services have risen proportionately. While the commenter is correct that losses will rise roughly in proportion to home prices, losses are, as the commenter acknowledges, a very small fraction of the cost of providing title insurance and escrow services (6% according to the commenter – leaving 94% insensitive to home prices). The remaining 94% of the cost of providing the product or service has risen no faster than consumer prices (likely slower due to the introduction of increased automation), which have risen far more slowly than home prices.

**Summary of Comment (page 2):**

The Department of Insurance is not promoting the regulation of real estate broker's fees due to a jurisdictional barrier, but the Insurance Commissioner should consult with the Real Estate Commissioner regarding this "price creep" in terms of excessive rates and the non-competition finding.

**Response to Comment:**

The Commissioner rejects this comment. The proposed regulations do not require direct marketing, so no response is necessary.

**Summary of Comment (page 2):**

I believe the Department has not brought clarity to its points. Lower fees are emotionally on target with constituents' financial goals; however, without sound economic principles guiding this, you are placing us tragically in front of a train wreck waiting to happen.

**Response to Comment:**

The Commissioner rejects this comment. The proposed regulations seek to implement the statutory mandate that rates not be excessive. The commenter has identified no sound economic principle with which the commenter believes the proposed regulations conflict.

**Summary of Comment (pages 2-3):**

You stated that title insurers "market their services to other entities in the real estate transaction who are able to refer the home buyer to a particular title insurance or escrow provider." I typically see this as a mortgage broker in a refinance (who facilitates connections a customer requires for title insurance, escrow services and the loan) or the real estate agent in a sales transaction. This is similar to going to a hair salon and seeing bottles of name-brand shampoo; the consumer relies on the agent and his expertise and judgment to educate him or herself, independent of the agent.

**Response to Comment:**

The Commissioner rejects this comment. The Commissioner understands the commenter to be saying that it is not uncommon in the economy for consumers to rely on trusted sources for recommendations and referrals. But there are important differences between the example the commenter gives and title and escrow services. For example, it is not clear that consumers are even as aware of the nature of the service, its costs, their opportunities to comparison-shop, and even that they are buying the service in the case of title and escrow as in the case of hair-care products. Nor is it as clear that there is an absence of competition in those markets as there is in the title and escrow markets. In any event, the possible existence of other markets in which there may be an absence of competition, if such markets exist, is no reason for the Commissioner to ignore excessive prices in the title and escrow markets, where he has found such an absence.

**Summary of Comment (page 3):**

Throughout your paper, you describe the intrinsic market structure of the title insurance industry as reverse competition, indicating that this is nothing more than illegal kickbacks promoted by officers and representatives. I do not understand why you do not

immediately solicit the services of the State Attorney General's Office rather than solicit fee regulations.

**Response to Comment:**

The Commissioner rejects this comment. The Commissioner understands the commenter's reference to the Attorney General to be questioning why the Commissioner does not prosecute illegal rebating. The Commissioner has, in fact, prosecuted such cases and obtained millions of dollars in refunds to consumers and substantial penalties. However, the structure of this market, beyond illegal rebating, has given rise to the absence of competition, an absence that cannot be remedied merely by prosecuting illegal rebating.

**Summary of Comment (page 3):**

The costs disclosed in Subarticles 1-5 to monitor the proposed regulations and hire statistical agents to perform extensive quality review of data are extraordinarily high costs at the high end of oversight management – resulting in a very expensive and labor intensive regulation to solve a problem that has not yet been well defined or supported. Your proposal is not fiscally responsible business.

**Response to Comment:**

The Commissioner rejects this comment. The Commissioner has weighed the cost – to the state and to regulated firms – of implementing the proposed regulations and has concluded that the proposed regulations are cost-effective, given the absence of a reasonable degree of competition, the evidence of substantially excessive rates, and the fact that over $4 billion in consumer charges are at issue annually.

**Summary of Comment (page 3):**

Fixed expenses remain fixed. However, variable expenses, such as increase in liability commensurate with the value of real estate a title company must defend, is a direct and justifiable reason to receive increased compensation. This is sound economic principle and sound fiscal responsibility. I have not heard of a single event where title insurers have raised their rates.

**Response to Comment:**

The Commissioner rejects this comment. The regulations capture both fixed and variable expenses and treat them appropriately. The increased liability is treated as a variable expense, but, as the commenter has acknowledged above, represents a very small fraction of the cost of providing title insurance and escrow services. When the commenter says title insurers have not raised their rates, she is clear they have not raised the percentage of the transaction on which the rate is based. The Commissioner has consistently pointed out that given the very sharp increase in home prices, a constant percentage of

transactions will inevitably yield much higher premiums, with the increase in premiums not justified by the increase in variable costs.

**Summary of Comment (page 3):**

I am uncomfortable with you indicating that you have "developed mathematical formulae to determine reasonable fixed costs." As a constituent, I do not want government developing models to define "reasonable fixed costs" because this defies what we worked so hard to achieve, market competition. Your issue of fixed expenses seemed a bit confusing and anti-competitive.

**Response to Comment:**

The Commissioner rejects this comment. The Commissioner has propounded the proposed regulations precisely because of the absence of a reasonable degree of market competition. Given that absence, and the duty of the Commissioner to prohibit excessive rates, the proposed regulations are the most reasonable effective way to make manageable the process of identifying and prohibiting excessive rates.

**Summary of Comment (page 3):**

Regarding the comment "[t]his market structure results in increased costs," I could not figure out how you calculated the increased costs as a result of the market structure (what you call reverse competition, i.e., kickbacks). Are the increased costs variable, fixed or simply illegal?

**Response to Comment:**

The Commissioner rejects this comment. The increased costs to which the quotation refers are increased costs to consumers, not to companies. They are "variable," in the sense that the title and escrow companies are charging them as a percentage of transaction amount, but that fact is not particularly significant. To the extent illegal and anti-competitive marketing practices impose costs on title and escrow companies, it is not significant whether they are fixed or variable because the proposed regulations do not allow for them to be passed through in rates.

**Summary of Comment (pages 3-4 ):**

Regarding your discussion of inadequate competition in the form of bundled packages of service (which you did not address): If an insurance company is bringing in excessive fees, then it may be in the position to undercut fees in their more competitive divisions such as escrow departments. Unfair competition or inadequate competition becomes a real problem when discussed in terms of bundled packages of real estate services. The fees are lower because they are subsidized. From a competitive marketing strategy, it seems like good business for the title company, but this practice eradicates fair market

competition. This practice better describes the "inadequate competition" that faces the insurance and real estate industry.

**Response to Comment:**

The Commissioner rejects this comment. The commenter appears to be raising a legitimate concern, the existence of controlled business arrangements within the industry that tend to harm competition. That observation reinforces the absence of a reasonable degree of competition and, under Insurance Code section 12401.3, calls for enforcement of the prohibition against excessive rates. While there may or may not exist regulatory measures available to address such arrangements and their injury to competition, they lie outside the scope of these regulations. There is no reason to believe that the Commissioner could take effective action against such arrangement that would create reasonably competitive markets and obviate the need for effective regulatory prohibition of excessive rates.

**Summary of Comment (page 4):**

Vigorous competition already exists and our fees are already competitively priced. If you undercut, regulate or cause to subsidize fees at the low end, the consumers in the long run will be subject to bundled packages, which is non-competitive. A free market sometimes means watching and not doing.

**Response to Comment:**

The Commissioner rejects this comment. The assertion that vigorous competition already exists is inconsistent with the findings of the Competition Report and other studies of these markets and is rejected. In the absence of a reasonable degree of competition, merely "watching and not doing" is not an appropriate response.

**Summary of Comment (Bates pages 234-257):**

A copy of the Initial Statement is attached at Bates pages 234-242; a duplicate copy of the letter with comments summarized immediately above and a copy of the Initial Statement is at Bates pages 243-257.

**Response to Comment:**

This portion of the comment is not specifically directed at the Commissioner's proposed regulations or to the procedures followed in proposing the regulations, or simply summarizes comments which are summarized and responded to in more detail below. No response is, therefore, necessary. (Gov. Code section 11346.9.)